IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Civil Second Appeal No.335/1981

Kamruddin Son of Shri Abdul Samad
...defendant-appellant
Versus
Shri Bihari Lal S/o Shri Ram Pratap
...Plaintiff-Respondent
AND
Smt. Kamla Devi W/o Shri Gulabchand
...defendant-respondent

Date of Judgment ::: 04.10.2006

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Ajeet Bhandari, Counsel for defendant-appellant
None present for respondents

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//REPORTABLE//

By the Court:-

This second appeal under Section 100 of the Code of Civil Procedure, on behalf of defendant no.1-appellant - Kamruddin, is directed against the judgment and decree dated 6th of November, 1981, passed by the Additional District Judge No.2, Jaipur City, Jaipur, in Civil Appeal No.62/1977 – Biharilal Vs. Kamruddin & Another, whereby the appeal filed by plaintiff Biharilal was allowed and the suit of the plaintiff for possession of the disputed property was

decreed, by setting aside the judgment and decree dated 22nd of March, 1976, of the lower court whereby the lower court dismissed the civil suit of the plaintiff-respondent no.1 for possession and mesne profits.

This court, while admitting the second appeal on 5.1.1982, formulated the following substantial questions of law:-

> “1. Whether a suit for possession only can lie without a prayer for cancellation of the sale deed made in favour of the appellant?
>
> 2. Whether the suit for possession can be filed until the decree for partition attains the finality and the disputed share is allotted to the transferor of the plaintiff?
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> 3. Whether the suit is barred on the ground of non-joinder of the necessary party?
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> 4. Whether the suit suffers from multifariousness of cause of action and the parties?
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> 5. Whether the sale in favour of the appellant was made with prior approval and acquiescence of Laxmansingh and therefore, he is estopped from challenging this sale?
>
> 6. Whether the eldest brother as Karta was empowered to sell the property?
>
> 7. Whether the Rule of Primogeniture is not applicable in

the present case?

8. Whether the sale made prior to the passing of preliminary decree are void?

9. Whether the principles of estoppal are applicable against the plaintiff?”

Brief facts giving rise to this second appeal are that plaintiff-respondent Biharilal filed a civil suit for possession against defendant no.1-appellant Kamruddin as well as defendant no.2-respondent Smt. Kamla Devi in respect of the property, in dispute. The description of the property, in dispute, was mentioned in sub-paras 'ka' and 'kha' of para 4 of the plaint. Sub-para 'ka' relates to the property sold to the defendant no.2-respondent Smt. Kamla Devi, whereas the property i.e. small piece of land, which was sold to defendant no.1-appellant, has been described in sub-para 'kha' of para 4 of the plaint, measuring 10 feet 6 inch towards east and west and 4 feet towards south and north, and numbered as 12. The plaintiff, in its plaint, pleaded that there is one 'haveli' known as 'haveli chandroli' belonging to Raja Sher Singh. After the death of Raja Sher Singh, his four sons, namely, Kalyan Singh, Laxman Singh, Pratap Singh and Amar Singh, became joint owner of the said property. One of

the brothers Amar Singh filed a suit for partition against remaining three brothers on 28th of August, 1963 in which a preliminary decree of partition was passed on 11th of September, 1967, declaring 1/4th share of each brother in the said 'haveli'. The final decree in the suit was passed on 5th of November, 1971. It was also pleaded that the eldest brother Kalyan Singh, without any consent of remaining brothers, sold the property, described in para 4 'ka', to defendant no.2-respondent Smt. Kamla Devi, and the property described in para 4 'kha' of the plaint had been sold to defendant no.1-appellant in the year 1965 and the defendant no.1-appellant put tin-shed on the same and gave the shape of shop. It was further pleaded that after passing the final decree in the partition suit, the property in dispute, came in the share of Laxman Singh, who sold the same to the plaintiff-respondent Biharilal through sale-deed dated 21st of September, 1972, for a sum of Rs.7000/- and the sale-deed was got registered, therefore, the plaintiff has become the owner of the said property and he is entitled to get a decree of possession in his favour and against the defendants no.1 and 2.

The defendants no.1 and 2, both, filed their separate written statements. The defendant no.1-

appellant pleaded that after the death of Sher Singh, Raja Kalyan Singh, who was the eldest son of late Shri Sher Singh, became the absolute owner of the entire property as per the Rule of Primogeniture. It was contended that Raja Kalyan Singh had exclusive right to sale the property and the defendant no.1 had purchased the property, in dispute, described in Para 4 'kha' of the plaint by way of sale-deed for a consideration of Rs.800/-, and since then he is in possession of the same. It was also pleaded that the present suit is not maintainable as no declaration has been sought and without it, no decree of possession can be passed.

Learned lower court, on the basis of the pleadings of the parties, framed issues in the case. Both the parties led oral as well as documentary evidence in support of their cases. The learned lower court, vide its judgment and decree dated 22nd of March, 1976, dismissed the suit of the plaintiff-respondent no.1. Being aggrieved with the same, an appeal was preferred by the plaintiff before the first appellate court, which was allowed. Being aggrieved with the judgment and decree dated 6th of November, 1981, passed by the first appellate court, the defendant no.1-appellant Kamruddin as well as

defendant no.2-respondent Smt. Kamla Devi, both, preferred separate appeals before this court which were registered as S.B. Civil Second Appeal No.335/1981 – Kamruddin Vs. Bihari Lal & Another, and S.B. Civil Second Appeal No.296/1982 – Kamla Devi Vs. Bihari Lal & Another.

So far as S.B. Civil Second Appeal No.296/1982 – Kamla Devi Vs. Bihari Lal & Another, is concerned, the parties had entered into a compromise during the pendency thereof and a copy of the compromise was placed on the record of the file and on the basis of that compromise that second appeal was disposed of by this court vide order dated 8th of March, 2001.

Learned counsel for the defendant no.1-appellant contended that the prayer of the plaint shows that it was only for possession and mesne profits, whereas from the pleadings of the plaint itself it is clear that there was already a sale-deed executed by Kalyan Singh in favour of the defendant no.1-appellant but in the plaint no prayer was made seeking declaration to the effect that the sale-deed executed by Kalyan Singh in favour of defendant no.1-appellant is ineffective against the plaintiff nor there was any prayer to cancel the sale-deed executed by Kalyan Singh, one of the co-parcener and eldest son

of late Shri Sher Singh, in favour of the defendant no.1. He, therefore, contended that the suit for possession itself was not maintainable and the learned lower court was right in dismissing the suit of the plaintiff. The learned lower appellate court has committed a serious illegality in decreeing the suit of the plaintiff for possession without declaring the sale-deed executed in favour of the defendant no.1 as ineffective against him or cancelling the same.

Shri Ajeet Bhandari, learned counsel for the appellant, also contended that the property known as 'haveli chandroli' was a property of joint-Hindu-family of four brothers, namely, Kalyan Singh, Laxman Singh, Pratap Singh and Amar Singh. And, Kalyan Singh, being the eldest son of late Shri Sher Singh had a right under Hindu Law to sale the property for necessity of the family or for welfare of the other co-parcener, and even if it is taken that Kalyan Singh had no right to sale the undivided Hindu joint-family property then at-least the sale-deed executed by Kalyan Singh in favour of defendant no.1 was only voidable and cannot be said to be void, therefore, it was necessary to get the voidable sale-deed cancelled by making a specific prayer in the present suit. In support of his case, learned counsel for the appellant

referred to the following decisions -

1. Indernath Modi Vs. Nandram and Others – AIR 1957 Rajasthan 231
2. Raghubanchmani Prasad Narain Singh Vs. Ambica Prasad Singh – AIR 1971 SC 776
3. Ramchandra Jivaji Kanago & Another Vs. Laxman Shrinivas Naik & Another – AIR (32) 1945 Privy Council 54

He also referred to the decision in the case of Chikkathamaiah & Others Vs. Chikkahutchiah & Others – AIR 1977 Karnataka 99.

No one is present on behalf of the plaintiff-respondent no.1 in spite of service of notice. It is relevant to mention that fresh notice was also given to the respondent no.1 on 11th of July, 2006 and that notice has also been served on him, but still no one is present on his behalf.

I have heard learned counsel for the appellant and considered the submissions made by him.

In para 6 of the plaint the plaintiff pleaded that the property described in para 4 'kha' of the plaint, relating to defendant no.1-appellant, had been sold in 1965 by Raja Kalyan Singh to defendant no.1 and the defendant no.1 had put a tin-shed and gave the

said piece of land the shape of shop. It shows that the plaintiff was in knowledge of the fact that Kalyan Singh, the eldest son of late Shri Sher Singh, had sold the said piece of land to defendant no.1-appellant way back in 1965 itself. PW-1 Bihari Lal in his statement before the lower court, which was recorded on 12.8.1975, admitted in his cross-examination that before he purchased the property in dispute from Laxman Singh, he had knowledge that the disputed property had already been purchased by defendant no.1-appellant Kamruddin from Kalyan Singh. Therefore, from para 6 of the plaint as well as from cross-examination of PW-1 Bihari Lal it is clear that the property in dispute had already been purchased by defendant no.1-appellant from Kalyan Singh in the year 1965 as pleaded in the plaint and the purchaser of the property i.e. the plaintiff Bihari Lal had also knowledge about it much before he purchased the property in dispute from Laxman Singh, another brother of Kalyan Singh.

It is also relevant to mention that Raja Amar Singh filed a suit for partition against his three brothers, on 28th of August, 1963, wherein a preliminary decree was passed on 11th September, 1967 and final decree was passed on 5th November, 1971. The

Additional District Judge No.2, Jaipur City, in Civil Appeal No.43/71 (Exhibit-1) observed at para 4 of the judgment that in the present case a substantial portion even beyond 1/4th has been disposed of by the defendant no.1 Raja Kalyan Singh, and other brothers now do not want to get things undone. The relevant para (at page 4) of Exhibit-1 is reproduced as under:-

> "I have heard the parties and the commissioner. In the present case a substantial portion even beyond 1/4th has been disposed of by defendant No.1 Raja Kalyan Singh. The other brothers now do not want to get the thing undone. All the co-sharers are agreed to accommodate the purchasers and the transferees because it transpires that they have also received their shares at the time of transfers."

The above observation in Exhibit-1, makes it clear that even Laxman Singh, the brother of Kalyan Singh, had no objection, not to unsettle the purchasers of the property from Kalyan Singh. From the above facts and circumstances of the case, it is clear that the property, in dispute, was purchased by defendant no.1 from Kalyan Singh much before passing

of the preliminary decree as well as final decree and, during the course of arguments for preparing the final decree in a partition suit in between the four brothers, it was agreed upon by all the brothers including Laxman Singh, who sold the property in dispute to plaintiff Bihari Lal, that whatever property has been purchased by the purchasers may not be disturbed. In these circumstances of the matter, it is clear that the plaintiff had knowledge about sale of the property in dispute by Kalyan Singh to defendant no.1-appellant. The purchaser Bihari Lal, the plaintiff, had also knowledge much before he purchased the property in dispute from Laxman Singh in the year 1972, that the property in dispute had already been purchased by defendant no.1 from Kalyan Singh but still no prayer was made in the plaint to cancel the sale-deed executed by Kalyan Singh in favour of the defendant no.1-appellant nor made any prayer for declaration to the effect that the sale-deed executed by Kalyan Singh in favour of the defendant no.1-appellant is not binding on the plaintiff or that the same is ineffective against him.

It is also relevant to mention that the property in dispute was sold to defendant no.1 by Kalyan Singh, the eldest son of Sher Singh, therefore,

it cannot be said that the sale-deed executed in favour of the defendant no.1 was void but it was voidable and in these circumstances it was necessary to get the said sale-deed cancelled as laid down in the cases of Indernath Modi Vs. Nandram and Others – AIR 1957 Rajasthan 231; Raghubanchmani Prasad Narain Singh Vs. Ambica Prasad Singh – AIR 1971 SC 776; Ramchandra Jivaji Kanago & Another Vs. Laxman Shrinivas Naik & Another – AIR (32) 1945 Privy Council 54 and Chikkathamaiah & Others Vs. Chikkahutchiah & Others – AIR 1977 Karnataka 99.

In view of the above discussion, the question no.1 is decided in the manner that the present suit for possession filed by the plaintiff-respondent no.1 was not maintainable without prayer for cancellation of the sale-deed made by Kalyan Singh in favour of the defendant no.1-appellant and the first appellate court has committed a serious illegality in decreeing the suit of the plaintiff-respondent no.1 without cancelling the sale-deed executed by Kalyan Singh in favour of the defendant no.1-appellant.

So far as other questions of law formulated are concerned, the same have not been pressed by the learned counsel for the appellant during the course of arguments and, as such, the same are not being

decided.

Consequently, the second appeal is allowed. The impugned judgment and decree dated 6.11.1981 of the Additional District Judge No.2, Jaipur City, in Civil Appeal No.62/77, is set aside, and the judgment and decree dated 22.3.1976 of the Additional civil Judge, Jaipur City, in Civil Suit No.18/73 (86/73 & 2/76) is restored. The cost is made easy.

(Narendra Kumar Jain) J.

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